

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-210082.2

DATE: September 2, 1983

MATTER OF: Contact International, Inc.--Request for
Reconsideration

DIGEST:

1. Prior decision, which concurred with contracting officer's decision to conduct resolicitation because of solicitation ambiguities, met required showing of prejudice. Ambiguities caused offerors to compete on an unequal basis and it was unclear which offeror, absent the ambiguities, would have been low.
2. Procuring agency's supplemental report, which was received three days after GAO decision was issued, has been considered at this time. The supplemental report supports the decision.

Contact International, Inc. (Contact), requests reconsideration of Servrite International, Ltd., B-210082, July 19, 1983, 83-2 CPD 100, in which we held that Naval Supply Center request for proposals No. N00189-82-R-0233, under which Contact was awarded a contract for the operation of a dairy products plant, was ambiguous as to whether the cost of nonfat dry milk solids (powdered milk) was to be included in proposed prices. Since it was unclear which offeror would have been low had offerors competed on an equal basis, we concurred with the contracting officer's decision to recompute the option years of Contact's contract. Contact contends that the decision is erroneous for the following reasons: (1) Servrite, which protested award to Contact, did not make the required showing of prejudice; and (2) GAO failed to consider a supplemental agency report.

The prior decision is affirmed.

Contact argues that an award under a defective solicitation should not be resolicited unless there is a

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showing that other offerors were prejudiced by the defect. Contact contends that our decision found that Servrite did not prove that, but for the ambiguity, it would have definitely been low, but rather that it may have been low. Contact protests that this finding does not meet the showing of prejudice required by our decisions.

An award made pursuant to a defective solicitation is not improper if the award serves the actual needs of the Government and other offerors were not prejudiced. See Hydro Power Equipment Co., Inc., B-205263, May 17, 1982, 82-1 CPD 466. However, none of the cases cited by Contact indicate that other offerors must establish that, but for the defect, they definitely would have been low. Our decision in Downtown Copy Center, 62 Comp. Gen. 65 (1982), 82-2 CPD 503 indicates the contrary. That case held that the cancellation of a solicitation after bid opening was not unreasonable where the estimated quantities in the solicitation were based on questionable quarterly reports of the incumbent contractor, which reasonably appeared to give the incumbent an unfair advantage. The incumbent argued (as Contact does here) that there was no showing that it would have been displaced as low bidder had prices been based on different estimates. The record did not indicate that the incumbent would in fact have been displaced; yet, it did indicate that the incumbent might have been displaced had bidders competed on an equal basis. We stated that "cancellation is appropriate whenever it appears that for some reason fair and equal competition--or competition on an equal basis--might have been thwarted." 62 Comp.Gen., supra, at 68. In considering the possibility of displacement, we concluded that "[a]lthough the record does not establish that either of these possibilities [displacement or nondisplacement] in fact would have occurred, the importance of protecting the integrity of the competitive bidding system and preventing even the appearance of an unfair competitive advantage provides sufficient basis for canceling a solicitation in the face of a reasonable possibility that a bidder had an unfair advantage." 62 Comp. Gen. supra, at 70. See also A.R.&S. Enterprises, Inc., B-196518, March 12, 1980, 80-1 CPD 193.

Here, the ambiguity in the solicitation caused offerors to compete on an unequal basis. Although the record does not establish whether Servrite or Contact would have submitted the lowest price had they competed on an equal basis, the record in this case nevertheless meets the

required showing of prejudice to provide a basis for the contracting officer's decision to resolicit the option years of Contact's contract. Downtown Copy Center, supra;
A.R.&S. Enterprises, Inc., supra.

Contact contends that our decision failed to consider the Navy's July 18, 1983, supplemental report, which was received by our Office on July 22, 3 days after our July 19 decision. We have considered the supplemental report at this time. The supplemental report does not conflict with our decision, but rather supports our conclusion that the amended RFP was ambiguous because it contained provisions which did not clearly support either Servrite's or Contact's interpretation, but rather contained provisions which supported both interpretations. The report also rebuts Servrite's April 22 comments regarding the Navy's failure to conduct a cost analysis of Contact's proposal. This latter issue was raised for the first time in Servrite's comments and was, therefore, untimely. See Sun Electric Corporation, B-202325, August 10, 1981, 81-2 CPD 112. Our decision did not address this untimely issue.

Contact states that the supplemental report "clearly demonstrates the agency's view that no provisions in the solicitation support Servrite International's interpretation of the alleged ambiguous solicitation." This statement appears to be based on the following statement from the supplemental report: "Servrite points to no specific provision in the original RFP as clearly stating that prices are to include the cost of commercially furnished NFDSMS [powdered milk]." Contact misconstrues this statement. The fact that the Navy finds no provision in the "original" (preamendment) RFP which "clearly" supports Servrite's interpretation does not mean that the RFP "clearly" supports Contact's opposing interpretation, nor that Servrite's interpretation of certain RFP provisions, when considered alone, is unreasonable.

The prior decision is affirmed.

for Harry R. Chan Cleave
Comptroller General
of the United States